

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS

3
4 JOHN BRADLEY,)
5 Plaintiff,)
6 vs.) CA No. 13-12927-IT
7)
8 OFFICE OF THE DISTRICT ATTORNEY)
FOR PLYMOUTH COUNTY,)
9 Defendants.)

10 BEFORE: THE HONORABLE JUDGE INDIRA TALWANI
11

12 HEARING ON MOTION TO DISMISS
13

14
15 John Joseph Moakley United States Courthouse
16 Courtroom No. 17
One Courthouse Way
17 Boston, MA 02210
18 Thursday, October 30, 2014
2:27 p.m.

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21 Cheryl Dahlstrom, RMR, CRR
Official Court Reporter
22 John Joseph Moakley United States Courthouse
One Courthouse Way, Room 5507
23 Boston, MA 02210
24 Mechanical Steno - Transcript by Computer
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P R O C E E D I N G S

THE CLERK: This is Civil Action 13CV12927, John Bradley v. Timothy J. Cruz, et al. The Honorable Judge Indira Talwani presiding. U.S. District Court for the District of Massachusetts is now in session. Will counsel please identify themselves for the record.

MR. SINSHEIMER: Good afternoon, your Honor. Robert Sinsheimer for the plaintiff.

MR. COHEN: Your Honor, good afternoon. Bret Cohen for the defendants.

MR. SHERIDAN: Good afternoon, your Honor. Rob Sheridan for the defendants.

THE COURT: Okay. We're here on defendants' motion to dismiss. It's your motion.

MR. COHEN: May I proceed, your Honor?

THE COURT: Yes.

MR. COHEN: I was waiting for the proper cue here.

Your Honor, thank you for taking the time to see us today. This will be one of the few times, I think, in my entire career that when I say I will be brief, I actually will be. I think that the issues in front of the Court are succinct. I suspect, from the times I have appeared before you -- well, the time -- that you will be prepared, and I won't bore you with the recitation of the facts because I think you understand why we're here.

1 What I would like to do is just quickly tick off what
2 is -- what's in front of the Court, and then we'll go through
3 each of the two counts in order. And then, of course, I will
4 be prepared to take whatever questions that you have.

5 First, the Court appreciates there are six counts in
6 front of it. If it wasn't relevant, I wouldn't mention what
7 they are. The six are: 1), there's a 1983 action; 2), there's
8 a Mass. civil rights action; 3), there's a tortious
9 interference with contract action relevant to the reasons we're
02:28 10 here today; 4), there's a breach of covenant of good faith and
11 fair dealing claim, otherwise known as Fortune claim, which is
12 the other reason why we're here today. The fifth claim is
13 wrongful termination and violation of public policy; and the
14 last claim is a violation of the Mass. Whistleblower's Statute.

15 Now, the only two claims that are in front of the
16 Court are the tortious interference and the covenant of good
17 faith a fair dealing claims.

18 THE COURT: You know, to short circuit a little bit of
19 your discussion, I understand that the plaintiff is suggesting
02:28 20 that the Fortune claim might survive on a public policy-type
21 argument. I assume that was your reason for listing the six.
22 Maybe not.

23 MR. COHEN: It is. It is. And so thank you, your
24 Honor. What I would have said at the end of that particular
25 discussion would have been perhaps that in line of damages and

1 the like would survive, but it would be in a different claim.

2 So, your Honor, I understand from doing the research
3 that I could that you're not unfamiliar with employment law.
4 So I won't -- I will keep that in mind as we go through this.
5 But just so that I'm making a clear record of our position on
6 this, I think you can appreciate why I would do that.

7 As this Court appreciates, the standard rule of law in
8 Massachusetts is that employees are employed at the will of
9 their employer unless there's a contract. And the exception to
02:29 10 that are those that are prohibited by law: discrimination, et
11 cetera, et cetera.

12 What's happened, as this Court appreciates, is that at
13 some point the courts have also come up with other exceptions,
14 and the one that we're here to discuss is the Fortune line of
15 cases. I think I might be the only Massachusetts lawyer who
16 has actually tried to verdict two Fortune claims. One of them
17 is the *Okerman* case, which has gone up and down to the Court of
18 Appeals a bunch of times and finally settled.

19 But I think for just a quick moment, the rubric of
02:30 20 that case is appropriate to discuss, which is in that instance,
21 as this Court, I think, probably appreciates, there's a guy
22 that sold cash registers for a long time and probably didn't
23 make a lot of money doing it. And then roughly in the early
24 '70s he hits a big sale, a huge sale. He's going to make
25 millions and millions of dollars literally, in 1970 dollars, as

1 a consequence of that sale.

2 And his employer, roughly speaking, says, Hey, look.
3 We can't paid you that much in commissions. Well, let's agree
4 to take less. He says, Why would I do that? They said, If you
5 don't do that, we're going to fire you, the undercurrent theme
6 being: we can. There's no exception to the at-will doctrine
7 under those circumstances at that point in the law.

8 So, ultimately, that case goes up to the SJC, and the
9 SJC says, No, no, you can't do this. You cannot fire somebody
02:31 10 -- now we're starting to get into the meat of it. You cannot
11 fire an employee in bad faith to avoid paying them compensation
12 that they've earned and is due and payable that results in a
13 windfall to you as the employer. That's what the law is.

14 And the key part of that for this discussion of --
15 falls in a couple different spots. And I'm going to cite
16 *Harrison v. NetCentric*, SJC, 2001 case. The employee must be
17 terminated in bad faith, and the compensation is clearly
18 connected to work already performed.

19 Now, with that umbrella, Mr. Bradley's Fortune claim
02:31 20 fails for three reasons. The first is because Fortune does not
21 extend to compensation contingent upon events that have not yet
22 occurred, and the courts have expressly provided, binding
23 appellate precedent, that that applies to unvested pension
24 benefits. Black Letter Law. It fails for a second time --

25 THE COURT: Which I don't need to reach if I get to

1 rule on the first.

2 MR. COHEN: Say that one more time, your Honor.

3 THE COURT: The second and third arguments I don't
4 need to reach if I rule for you on the first.

5 MR. COHEN: That's absolutely correct, your Honor.

6 I think the Court would appreciate, before I get to
7 the second and third real quickly, we have other arguments in
8 our brief. I'm not raising them right now relative to Fortune
9 because they're in our brief. But I think, just to spell it
02:32 10 out and try to be clear and succinct and brief, which is not my
11 normal characteristic, I thought we would try.

12 The second is that Fortune requires that there be a
13 windfall to the employer because the bad-faith termination.

14 And even if you were to abandon -- and this is -- both
15 those instances are binding Massachusetts appellate
16 precedent -- then it still requires that the termination be
17 connected in some close proximity to the deprivation of the
18 compensation. There needs to be some temporal. And what I
19 would do by analogy, or say by analogy, is that, in the
02:33 20 connection with, say, the retaliation claim and discrimination,
21 the Court said, if the protected conduct is on Day One but the
22 termination takes place three years later, the courts -- that's
23 too far away. Generally, the courts have said, in that
24 instance, six months is something to look at. I'm going to go
25 through just a couple of cases that kind of define that in a

1 minute.

2 Okay. So just real quickly, the only really two facts
3 to the first point, which is that unvested pension benefits
4 don't fall within this category to be protected by Fortune, he
5 alleges in the complaint, Paragraph 45, 46, that the District
6 Attorney's Office terminated Mr. Bradley's employment eight
7 months shy of reaching his 20-year pension vesting date. As a
8 result of this involuntarily termination, Bradley, who would
9 have been able to begin receiving pension following separation
02:34 10 from the DA's office is now required to wait approximately
11 eight years before he can begin receiving these benefits, et
12 cetera. That's in the complaint, Paragraph 9. At issue under
13 -- is simply unvested pension benefits.

14 Now, the courts have said that -- in *Mullen*, for
15 example, the loss of future income for future services does not
16 come within the obligation of good faith and fair dealing for
17 Fortune. In that very case, Court of Appeals, 1992, the court
18 said, "The plaintiff's allegation in his affidavit that his
19 discharge deprived him of an increase in pension benefits is
02:34 20 not sufficient to demonstrate a Fortune-type forfeiture."

21 THE COURT: Any pension cases that go plaintiff's way?

22 MR. COHEN: Could not find a single case. That was
23 going to be my last point. By the way, they don't point to any
24 single pension case either. And, you know, I always get
25 nervous saying there's no case out there. But we've searched

1 and could not find one, and they did not point this Court to a
2 pension case.

3 THE COURT: Do you think it would make a difference if
4 it was a day before the vesting versus eight months?

5 MR. COHEN: Your Honor, I'm smiling because I asked
6 that of my colleague. I said, What if she asks me that very
7 question? And the answer is, no, it doesn't, because the
8 courts have said that this kind of benefit is not the kind to
9 which Fortune applies. Maybe he has that in another category
02:35 10 of damages, another count, just not a Fortune claim. And your
11 colleague, Judge Dein, down the hall or a floor or whatever, in
12 *Rodio*, looked at this very issue and concluded, in *Rodio v.*
13 *R.J. Reynolds*, D Mass. 2006, cited in our brief, that -- and I
14 think this is important because it goes to the heart of what
15 Fortune is. It says, "It is undisputed that *Rodio*, the
16 plaintiff, obtained that much of his pension to which he was
17 entitled to at age 50, his age when his employment terminated.
18 Thus, *Rodio's* employment clearly was not ended to deprive him
19 of compensation of benefits." And, as my colleague pointed
02:36 20 out, thankfully, we don't have that one-day situation here. So
21 that's the first reason.

22 The second one is that the -- there's a requirement
23 that there's a windfall on the company. There needs to be an
24 allegation by the plaintiff that -- at this stage of the game,
25 that we fired Mr. Bradley to avoid paying him compensation and

1 that we received a windfall for that. The reason why the
2 windfall for that is relevant, if you look at some of -- the
3 way the cases have come out, they've said, Wait a second.
4 Somebody who's a commission sales rep, they get fired, what the
5 company then does is they say -- plaintiff says, I didn't get
6 paid for commissions. The company says, Wait a second. We
7 took all those clients that were in the process of paying and
8 the like, and we redistributed those clients and those
9 relationships to other commission sales reps, allowed them to
02:37 10 get the commissions because they're the one who are going to
11 have to manage the relationships on a going-forward basis. We
12 didn't make any more money because of this. And the courts
13 have said the failure to have a windfall to the employer also
14 takes it out of the rubric of Fortune claims. They don't even
15 allege that we got a windfall.

16 Now, your Honor, they don't allege it because they
17 never could. So the DA's office didn't get a windfall because
18 we didn't pay him these additional benefits. It's a pension --
19 Mass. pension whatever it is. They haven't alleged it because
02:38 20 they can't allege it. But the failure to allege it is also
21 critical to their defeat of this particular claim although I
22 don't think you need to get there.

23 THE COURT: So if the claim is not a Fortune claim but
24 if the claim is, You fired me right then because you knew
25 that's when it was going to hurt the most, is that covered

1 under any of these other causes of action?

2 MR. COHEN: I guess that's up to my counsel to argue.
3 Probably under the -- one of the counts -- probably the last
4 count. He's got a count -- where's my list here. He had a
5 wrongful termination, violation of public policy, I guess. I'm
6 not saying he's not without remedy. It's not within Fortune.

7 THE COURT: I'm going to hold you to your word about
8 being brief. Do you want to address the other cause of action?

9 MR. COHEN: Yes, thankfully. Delighted to.

02:39 10 So the other one is the tortious interference with
11 contract. So, your Honor, you know what? I'm going to
12 actually set my notes aside. The law is very well-settled in
13 the Commonwealth, *Harrison* and the like, that an individual
14 cannot -- or a company can't tortiously interfere with its own
15 contract. What the *Harrison* case says.

16 THE COURT: I want to just see if there's a simpler
17 response on this. Am I correct in understanding that the DA's
18 authority to hire and fire is by statute?

19 MR. COHEN: It is.

02:39 20 THE COURT: Why isn't that the beginning and end of
21 your argument?

22 MR. COHEN: It is the beginning and the end of our
23 argument. It's entirely -- DA Cruz has the complete and utter
24 authority, complete authority, to --

25 THE COURT: But for some other reason that might be

1 illegal.

2 MR. COHEN: Right.

3 THE COURT: Race, sex, blah, blah, blah, blah.

4 MR. COHEN: That's exactly right. He is completely
5 vested with that authority. He is the DA's office statutorily;
6 so, therefore, a claim can't exist against him for tortious
7 interference with the contract.

8 THE COURT: I understand why you have the analogies to
9 corporations and the so forth. But it seems like we're dealing
02:40 10 with a unique situation where you have a statutory appointment
11 authority.

12 MR. COHEN: Well, it's unique in the sense that this
13 doesn't often happen. But in this instance, he can only -- the
14 DA's office can only act through somebody, and that somebody is
15 the DA. Thank you.

16 THE COURT: Thank you.

17 MR. SINSHEIMER: There's an irony in what I'm about to
18 say because I'm going to ask you not to dismiss a claim that I
19 very well might dismiss on the eve of trial. The reason I'm
02:40 20 going to ask you not to dismiss it is -- boils down simply to
21 prematurity.

22 We've all grown into this custom where the alleged
23 facts come into all counts, and then you try to think of every
24 count that you can stuff in to make sure you don't lose any
25 remedies. I didn't draft this complaint, but I think it's

1 well-drafted.

2 But as a trial lawyer, what I'm looking for is: Do I
3 have enough facts to state a claim? And will those facts, if
4 proven, allow the greatest amount of damages and consequential
5 damages under the law? It's pretty simple. There's liability
6 and there's damages.

7 Now, if I heard my brother to concede that I can get
8 the maximum damages under another count, then, frankly, I don't
9 care whether you dismiss the Fortune count or not. The labels
02:41 10 are irrelevant. And at the same time, since my brother was
11 very, very cautious and actually said, That's up to Mr.
12 Sinsheimer, I don't want to be put to a label this early in the
13 case. I want to preserve everything that's in the record to
14 get the maximum recovery available for my client.

15 Now, the good news. The good news is it has nothing
16 to do with the law. It has nothing to do with prongs. It has
17 to do with the fact that John Bradley is out there working
18 again.

19 THE COURT: Right. We don't have an eight-year wait.
02:42 20 We have --

21 MR. SINSHEIMER: No, we don't have an eight-year wait.
22 In two months he will probably be vested. By the way,
23 parenthetically, you know the poor woman who's charged with
24 murdering her children because they -- she left them to die in
25 a closet in Worcester, that horrible, horrible case. That's

1 John prosecuting it. So if you turn on the TV, you'll see a
2 party before you acting as a very distinguished lawyer in
3 Worcester Superior Court.

4 So, hopefully, he's going to earn his way through to
5 vesting. That's only two months from now, give or take.

6 THE COURT: But there are really two different
7 questions here. One is, assuming you prove liability on one of
8 your causes of actions, what are the damages, or in several --

9 MR. SINSHEIMER: Right.

02:42 10 THE COURT: -- of the causes of actions, what are the
11 damages.

12 MR. SINSHEIMER: Correct.

13 THE COURT: I understand that you are trying to
14 preserve the value of the delayed opportunity for the pension.

15 MR. SINSHEIMER: Exactly, exactly.

16 THE COURT: But the problem with trying to do it
17 through the Fortune method is that, if this pension claim
18 stands, so does every pension claim, and the courts --

19 MR. SINSHEIMER: Which is why, more likely than not,
02:43 20 when we actually get to trial, I may look at what I have to
21 prove. And don't forget, you're also requesting instructions
22 at that point in time. You're really focusing on the elements
23 of what you need to prove. It may go away.

24 But at least for now, I look at that *Shen* case that my
25 brother decided not to discuss, and it does suggest that you

1 can prove Fortune claims -- it's a Judge Tauro decision, cited
2 in our brief. It's says, on Page 54, that you can prove a
3 Fortune claim on the public policy. I acknowledged in my brief
4 it might be duplicative. He cites another case. He cites a
5 Judge Skinner case.

6 Let me also say that my brother says it's Black Letter
7 Law that you can't recover for lost pension. That,
8 technically, I don't quite agree with because the phrasing is
9 not "pension." The phrasing is "future damages for future
02:44 10 work," as it correctly states. Your question was right on the
11 money. What would happen if it was the day before or the hour
12 before? And I think, if those facts were presented, the
13 Fortune claim would survive.

14 As far as the windfall element, that's -- frankly, I
15 think it's a better argument. I have to give them their due
16 but -- because this is the public sector. There's nothing that
17 says you can't prove a Fortune claim in the public sector. The
18 windfall is not going to go to Mr. Cruz. So if that's
19 dispositive, I lose. I'm not going to waste time arguing
02:44 20 something that's just not there.

21 But the technical argument is that Fortune has never
22 been excluded for pension cases a hundred percent. The better
23 answer was there is no case to -- as he said the second time,
24 not that it's Black Letter Law.

25 THE COURT: Yeah, but it is Black Letter Law, is it

1 not, that what Fortune is trying to protect is what you have
2 earned so far, not what you hope to earn.

3 MR. SINSHEIMER: Correct. I agree with that totally.
4 But a pension is not what you hope to earn. A pension grows
5 day by day, second by second, minute by minute. It gets
6 back -- I mean, the real question -- the way we phrase it in
7 the brief -- it's obvious that the Court has read that very
8 carefully -- they timed it to hurt him the most. I really
9 believe I can prove that. And that means, you know, cut him
02:45 10 off right at the part where it would be legally most difficult
11 to achieve compensation.

12 So, truthfully, your Honor, at the end of the day, it
13 probably doesn't amount to a hill of beans, but I think the
14 safer approach is to keep it in the case at least through
15 summary judgment, see how the facts play out. I might not even
16 want it after that point. If you feel you have to dismiss it,
17 it's a matter of Black Letter Law, the four corners, I'm not
18 going to beat it to death. As far as the other one --

19 THE COURT: Yes.

02:46 20 MR. SINSHEIMER: That's a really, really interesting
21 question because I don't think Timothy Cruz is technically the
22 employer.

23 THE COURT: No. That's why I'm saying their analogy
24 to those other cases may not be that relevant. But he is the
25 appointing authority under the statute.

1 MR. SINSHEIMER: Right.

2 THE COURT: And he has -- if he doesn't have the
3 authority to interfere with this contract -- I would agree with
4 you that the employer is the government entity, not the
5 individual. But he's the appointing authority. And if he
6 doesn't have the authority -- if he can't essentially interfere
7 with this contract --

8 MR. SINSHEIMER: I think I agree with that. I think,
9 if it's decided -- which is their reply brief. It wasn't the
02:46 10 brief I first responded to. If it's decided on a purely
11 statutory basis, I don't know that I would have a big problem
12 with that.

13 But let me just -- this isn't really the issue raised
14 by this. But I'm always concerned in this case. This isn't
15 new to me where the Commonwealth itself is not a party because
16 they're the ones that write the check. We plaintiff lawyers,
17 that's all we're ever really interested in. I don't know. I'm
18 sure I can work this out with Mr. Cohen. He's very, very
19 collegial. Whether we need to amend to name the Commonwealth.
02:47 20 I know, as a matter of practice, that the Attorney General's
21 Office actually prefers it to be the other way. They treat the
22 agencies as separate clients, but I don't know if there's any
23 real authority. I was surprised not to see it because I raised
24 it. I don't know if they know there's any real authority, the
25 DA's office is truly an entity. They could sue or be sued.

1 Yeah, they hit me with the statutory thing in the
2 reply brief, and I don't have a real problem with that. All
3 I'm really doing in the secondary portion is flagging an issue.
4 There has to be an entity who is the employer, who is not Mr.
5 Cruz individually. That's why we opposed it, because Mr. Cruz,
6 if there is a judgment, isn't going to be the one who pays it.

7 THE COURT: No. I -- it seems to me that this further
8 question of is he the employer, is he not the employer, I don't
9 need to reach it.

02:48 10 MR. SINSHEIMER: You don't.

11 THE COURT: The threshold question is the appointing
12 authority and --

13 MR. SINSHEIMER: Excuse me.

14 THE COURT: I think that's the threshold question. I
15 don't see -- if you are right, I don't see how that statute
16 could have any validity if they can't appoint and fire. So I
17 think that blocks that claim.

18 With regard to amending your complaint, I don't --
19 that's not something that's teed up here.

02:48 20 MR. SINSHEIMER: Understood.

21 THE COURT: I think, if you are interested -- I don't
22 know where we are on the scheduling order. But assuming we
23 haven't passed the time for amending the pleadings, then I
24 would suggest you confer and decide where you're going to go.
25 And if you are seeking to add a party that is not a party here

1 to remember to comply with the local rule that you have to
2 serve them first.

3 MR. SINSHEIMER: Well, you know, Mr. Cohen has been
4 appointed Special Attorney General. I'm not sure the Court is
5 aware of that. That's always true in these kinds of situations
6 where the Commonwealth gets itself outside counsel. I think we
7 can work it out. If we can't, I'll move to amend. It's really
8 not about whether the actions were different. We -- enough
9 said for now.

02:49 10 MR. COHEN: Do you have any questions, your Honor?

11 THE COURT: I don't think so. So unless there's
12 anything further --

13 MR. COHEN: No. I think I'll take my cue and sit
14 down. Okay.

15 THE COURT: Thank you.

16 MR. COHEN: Thank you, your Honor. Thank you for your
17 time. Thank you.

18 THE CLERK: Court is in recess. All rise.

19 (Whereupon, at 2:50 p.m. the hearing concluded.)
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C E R T I F I C A T E

I certify that the foregoing is a correct transcript
of the record of proceedings in the above-entitled matter to
the best of my skill and ability.

/s/Cheryl Dahlstrom

December 1, 2014

Cheryl Dahlstrom, RMR, CRR

Dated

Official Court Reporter